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DEPARTMENT OF LAW OPINION NO. 70-3 (R-35)

REQUESTED BY: CHARLES D. HADLEY, Executive Secretary
Arizona Corporation Commission

QUESTIONS:

1. Is publication of notice of voluntary dissolution under A.R.S. § 10-362 necessary when there is unanimous written consent to the dissolution by the shareholders?

2. Is publication of notice of consolidation or merger under A.R.S. § 10-343 necessary when there is unanimous written consent to the consolidation or merger by the shareholders?

ANSWERS:

1. No.
2. See body of Opinion.

A.R.S. § 10-361.A. provides that:

"[a] corporation . . . may be dissolved at either an annual or special shareholders' meeting by two-thirds vote of the outstanding shares of stock, or by the unanimous written consent of all shareholders . . . . " (Emphasis added)

Thus, in the case of dissolution, the Legislature has specifically provided that all the shareholders of the corporation may approve its dissolution by means of unanimous written consent. If the holding of the meeting itself can be waived in this manner, it follows that there is no need to give notice of the time and place of a meeting which will not be held. Accordingly, it is apparent that A.R.S. § 10-362, which provides for notice and publication of time and place of shareholders' meeting to vote on proposed dissolution, does not apply to a situation in which dissolution is effectuated by the unanimous written consent of the shareholders. A fortiori, if by the unanimous written consent of shareholders, a meeting need not be held, then notice and publication of a meeting which actually is held also may be waived by unanimous shareholder action.

There can be no question that the Legislature has power to permit shareholders by unanimous written consent to waive notice of meetings and waive meetings themselves, whether such meetings be for purposes of dissolution or any other corporate purpose. ABA-ALT Model Bus.Corp.Act, (which has been adopted in some jurisdictions) Ballentine, Corporations § 170 (rev.ed. 1946); 5 Fletcher, Private Corporations, § 1996.1 (perm. ed. rev. repl. 1967). In fact, Ballentine notes that some state laws provide specifically for dissolution upon the written consent of all the shareholders without a meeting. Ballentine, at § 302.

In reply to question #2, with respect to consolidation or merger, (A.R.S. §§ 10-341 through 10-349), there is no statute specifically providing for approval of merger or consolidation by unanimous written consent of the shareholders. Parenthetically, although §§ 10-341 through 10-347 speak only of "consolidation", it is evident that the Legislature used the term in its broad sense, encompassing both "consolidation" and "merger" as those terms are understood in their technical sense. See, 15 W Fletcher, Private Corporations, § 7041 (perm.ed.rev.repl. 1961); H. Ballentine, Corporations, § 288 (rev.ed. 1946); and see, A.R.S. §§ 10-348 and 10-349, enacted in 1950.

Although there is no statute specifically permitting approval of merger or consolidation by unanimous written consent of the shareholders, nonetheless, with one exception, it is our opinion that merger or consolidation may be effected by unanimous written consent of the shareholders without a meeting. And, with this one exception, shareholders may unanimously waive notice and publication of a meeting actually held.

In absence of a statute expressly permitting shareholders to act by unanimous written consent, in lieu of a duly noticed formal meeting, the rule is that:

> "[w]here all of the shareholders of a company make a unanimous agreement as to a corporate transaction, there is no necessity for any further formality, and the company will be bound by the unanimous agreement of its members, subject to possible rights of creditors. [Citing cases]"
>
> H. Ballentine, Corporations § 170 (rev.ed. 1946)

Furthermore, with respect to a creditor s rights vis-a-vis merger or consolidation:

> "[a] creditor cannot, merely because he is a creditor, prevent a corporation from consolidating under legislative authority, and cannot maintain a suit to enjoin a consolidation."
>
> 15 W. Fletcher, Private Corporations, § 7151 (perm.ed.rev.repl. 1961)

There are some exceptions to the foregoing, such as invalid consolidation proceedings or fraudulent transfers of property, which might justify injunctive or other equitable relief at the instance of a creditor. See 15 W. Fletcher, Corporations § 7168 (perm.ed. rev.repl. 1961). On the other hand, it is generally held that:

> "[i]f [the creditor's] rights are fully protected by the statute and he is enabled to enforce them in an action against the consolidated or absorbing company, injunctive or other equitable relief would not be available to him."
>
> Fletcher, id. at § 7168; accord, Ballentine at § 170; see Cole v. National Cash Credit Ass'n., 18 Del. Ch. 47, 156 A. 183 (1931).

Assuming adequate statutory preservation of creditors' rights, then, the notice and publication provisions of A.R.S. § 10-343 cannot be for protection or benefit of creditors, since creditors would lack power to prevent the contemplated merger or consolidation. Therefore, if the applicable statutes protect creditors' rights, then notice and publication of meetings, as well as meetings themselves, may be waived by unanimous consent of shareholders, under the authorities cited above.

Arizona law fully protects creditors' rights in cases of merger or consolidation of two or more domestic corporations, or in cases in which the surviving or consolidated corporation is an Arizona corporation. A.R.S. § 10-346 provides that:

> "[a]ll debts due to, and all property and assets of, each corporation consolidated as provided in this article shall vest in the consolidated corporation, but rights of creditors against and liens on the property of each corporation consolidated shall be preserved unimpaired. The debts, liabilities and duties of the corporations consolidated shall pass to the consolidated corporation, and may be enforced against it in the same manner and to the same extent as if incurred or contracted by, or imposed upon it."

In such instances, therefore, it is our opinion that the shareholders may, by unanimous consent, waive necessity for compliance with A.R.S. § 10-343, and may waive holding of the meeting itself.

We reach the same conclusion with respect to a merger or consolidation in which the merged or consolidated corporation is a foreign corporation, if the surviving or merged corporate entity qualifies to do business in Arizona, as contemplated by A.R.S. § 10-348.A.2, which provides:

> "If the surviving or new corporation, as the case may be, is incorporated under the laws of another state, it shall comply with the provisions of Article 17 of this chapter, if it is to transact any business in this state."

In our opinion, creditors' rights are adequately protected by the requirements under Article 17 of Chapter 10 that a foreign corporation seeking to qualify to do business in Arizona, appoint a statutory agent and consent to suit in this state. See A.R.S. § 10-481.A.2.

However, in the rare instances in which the surviving or consolidated corporation is both a foreign corporation and does not choose to be qualified to do business in Arizona, creditors' rights might not be adequately protected and, therefore, the notice and publication required by A.R.S. § 10-343 might be held to be for the benefit of creditors. Accordingly, it is our opinion that shareholders in such cases cannot waive either the notice and

publication provisions of A.R.S. § 10-343, or the holding of the meeting itself.

Opinion No. 64-17, dated August 26, 1964, is modified, to the extent that it is in conflict with this opinion.

Respectfully submitted,

Gary K. Nelson by F.S.

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